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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-171

STATE OF LOUISIANA, PETITIONER

v.

JOHN C. SAWHILL, ET AL.

No. 74-181

THE PEOPLE OF THE STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

JOHN C. SAWHILL, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Temporary Emergency Court of Appeals (California Pet. App. A, pp. 1-21; Louisiana Pet. App. D, pp. 33a-52a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1974.[1] The petitions for writs of

[1] The court of appeals' decision was rendered from the bench on July 26, 1974 (Louisiana Pet. App. C, p. 32a). The opinion and judgment were filed on August 12, 1974,

certiorari were filed on August 23 and August 26, 1974, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254. See Section 5(a), Emergency Petroleum Allocation Act of 1973, P.L. 93-159, 87 Stat. 633.

QUESTIONS PRESENTED

1. Whether the Federal Energy Office terminated rule-making proceedings initiated by the Cost of Living Council thereby invalidating regulations removing the exemption from price controls for state and local government sales of petroleum and petroleum products.

2. Whether such regulations may be applied to transactions occurring before the date of adoption of the regulations, where the notice of proposed rule-making provided for an earlier effective date.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Economic Stabilization Act of 1970, 84 Stat. 799, as amended, 85 Stat. 743, 87 Stat. 27, and the Emergency Petroleum Allocation Act of 1973, P.L. 93-159, 87 Stat. 627, are set forth in the Appendix to the petition filed by the State of California.

Regulations of the Cost of Living Council and the Federal Energy Office, the Executive Order delegating authority to the Federal Energy Office, and the delegation of authority from the Cost of Living

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and on August 14, 1974, the judgment was modified to make its effective date July 26, 1974 (Louisiana Pet. App. E, p. 53a).

Council to the Federal Energy Office are also set forth in the Appendix to the California petition.

STATEMENT

The issues presented in this case concern the Federal Energy Office's withdrawal of the exemption from price controls of state and local government sales of petroleum and petroleum products. Petitioners do not challenge either the authority of the Federal Energy Office to withdraw the exemption or the merits of its decision to do so; rather, they contend that the regulations removing the exemption were invalid because of certain alleged procedural deficiencies. Since petitioners' primary claim relates to the procedures followed in adoption of the regulations, the events leading to the adoption are set forth in detail below.

1. The Rule-Making Proceedings

On August 9, 1973, the Cost of Living Council issued regulations generally exempting state and local governmental units from price controls under the Economic Stabilization Act. 6 C.F.R. 150.54(a) (38 Fed. Reg. 21601). This exemption was applicable to sales of petroleum and petroleum products which were otherwise subject to price controls. 6 C.F.R. 150.351, *et seq.*

The advent of the "October War" in the Middle East and the attendant boycott by Middle East countries of crude petroleum sales to the United States resulted in a contraction of available supplies

of crude petroleum. Fearing that these events would directly affect domestic prices for petroleum products, on October 25, 1973, the Cost of Living Council published a Notice of Proposed Rule-Making for the purpose of removing the exemption of state and local government sales of petroleum from price controls (38 Fed. Reg. 29618). Interested persons were invited to file written comments by November 24, 1973. The notice further stated that if the proposed regulation were adopted, it would be effective as of October 25, 1973, the date upon which the Notice was filed with the Federal Register.

On November 27, 1973, after the close of the period for receipt of comments but before action had been taken on the proposed regulation, Congress enacted the Emergency Petroleum Allocation Act of 1973, P.L. 93-159, 87 Stat. 627. The Act required the issuance of regulations to control prices and allocate supplies of petroleum products within 15 days of enactment.

On December 4, 1973, the President, pursuant to authority conferred by the Emergency Petroleum Allocation Act, created the Federal Energy Office (FEO), and delegated to it all authority vested in him by the Act. In addition, the President delegated to FEO the authority vested in him by Section 203 (a)(3) of the Economic Stabilization Act. The President also directed the Chairman of the Cost of Living Council (CLC) to delegate to the Administrator of FEO "such authority under the Economic Stabilization Act as may be necessary to carry out

the purposes of that Act with respect to energy matters." Executive Order 11748, 38 Fed. Reg. 33575.

On December 11, 1973, FEO issued proposed regulations as required by the Emergency Petroleum Allocation Act. 38 Fed. Reg. 34414, *et seq.* These proposed regulations simply adopted by reference the prevailing CLC price control regulations. See 38 Fed. Reg. 34434.

On December 26, CLC formally delegated its petroleum pricing authority, including the rule-making proceeding initiated on October 25, 1973, to the FEO (39 Fed. Reg. 24).

On December 27, the Federal Energy Office published revised Mandatory Fuel Allocation Regulations (39 Fed. Reg. 744, *et seq.*). The CLC price control regulations remained unchanged "except to the extent inconsistent with price regulations in this chapter" (39 Fed. Reg. 761). The new allocation regulations were to be implemented on January 15, 1974; the price rules were simply to remain in effect.

On January 14, 1974, the FEO issued revised Petroleum Allocation and Price Regulations (39 Fed. Reg. 1924, *et seq.*) which superseded the December 27, 1973 regulations. To avoid confusion, the new regulations were issued as a recodification so that newly-numbered provisions would not be confused with old proposals. Part 212 of the new regulations which concerned price regulations republished in full the existing Cost of Living Council regulations (39 Fed. Reg. 1924). The effect of republication was to transfer the petroleum pricing regulations from Title 6 of the Code of Federal Regulations (Economic

Stabilization) to Title 10 (Energy) so that "[p]ersons subject to the price and allocation regulations will now be able to have a single readily available source of information as to the rules established to govern this program" (39 Fed. Reg. 1924). Section 212.52(b) continued the state and local government exemption. Having completed the issuance of regulations as required by the Emergency Petroleum Allocation Act, the Federal Energy Office stated that "no specific future changes are currently anticipated * * *." *Ibid.*

On February 21, 1974, the FEO, acting on the rule-making proceedings initiated by the notice of October 25, 1973, announced the removal of the exemption from price controls for state and local governments effective October 25, 1973 (39 Fed. Reg. 7176). The FEO found that the exemption, if not removed, "would tend to have a disruptive impact on the national distribution system" (*ibid.*). It also became apparent from the comments received that

> * * * much of the crude oil sold by State and local governments is purchased by small independent refiners which, if they are required to pay the substantially higher prices now obtainable for uncontrolled crude oil, may experience severe competitive harm. Thus, although the relative quantity of crude oil involved is small, the effects of the exemption are focused on a particular segment of the industry, and the preservation of the competitive viability of small and independent refiners, which is a specific objective of the Act, would not be adequately ac-

complished unless the exemption is removed. [*Id.* at 7177.]

On March 5, 1974, in response to objections from several states, the FEO issued a notice of proposed reconsideration of the February 21 decision (39 Fed. Reg. 8996). A hearing was scheduled for March 13, 1974, and the public was invited to submit written comments in lieu of or in addition to oral presentation until 5:00 p.m., March 15, 1974.

On March 13, 1974, the hearing was held at the offices of the Federal Energy Office in Washington, D.C. Representatives of the States of California, Louisiana and Texas appeared and submitted oral testimony. On April 2, 1974, the FEO found that the evidence submitted reconfirmed its February 21, 1974 decision to withdraw the exemption of State and local government sales of covered petroleum and petroleum products (39 Fed. Reg. 12252).

2. The District Court Proceedings

Petitioner State of California filed this action on March 13, 1974, the date on which the FEO held the hearing on the proposed reconsideration of removal of the exemption. Petitioner State of Louisiana was permitted to intervene and on March 20, 1974, the district court granted petitioners' application for a temporary restraining order prohibiting enforcement of price controls with respect to California and Louisiana.

On May 1, 1974, after the FEO had reconfirmed its determination to withdraw the exemption, the dis-

trict court held the withdrawal invalid (Louisiana Pet. App. A, pp. 1a-7a). The court found that the FEO had terminated the rule-making proceedings initiated by the Cost of Living Council when it republished regulations preserving the exemption on January 14, 1974 (*id.* at 3a). Alternatively, the court held that the removal of the exemption, even if otherwise valid, could not be applied retroactively (*id.* at 4a-6a). The district court's findings and conclusions in support of its opinion were subsequently filed on May 28, 1974 (Louisiana Pet. App. A, pp. 9a-28a).

3. The Court of Appeals Proceedings

The court of appeals granted the government's request for a stay of the district court's order pending appeal, and on July 26, 1974, after oral argument, the court of appeals, in a ruling from the bench, reversed. The court of appeals indicated that its opinion would be filed subsequently and further explained that this unusual procedure had been employed because the amount in controversy was increasing at the rate of $1.2 million per day and "[t]he legal uncertainty surrounding these payments is injurious to the interests of all parties as well as third party small independent refiners who have accrued potential liabilities to the states" (Louisiana Pet. App. D, p. 41a, n.17).

The court of appeals opinion was filed on August 12, 1974. The court held that the "intervening transfer of authority from CLC to FEO and the sub-

sequent republication of price control regulations by FEO in a different section of the Code of Federal Regulations * * *" did not terminate the rule-making proceeding (Louisiana Pet. App. D, p. 44a). With respect to the issue of possible retroactivity, the court found "the effective date * * * is not only fair and reasonable but well designed to advance legitimate statutory and administrative policies" (*id.* at 50a).

ARGUMENT

1. Petitioners' primary contention is that the FEO's removal of the exemption from price controls of state and local government sales of petroleum products violated the notice and comment requirements of the rule-making provisions of the Administrative Procedure Act, 5 U.S.C. 553. Specifically, petitioners contend that the FEO's issuance of regulations on January 14, 1974, terminated the rule-making proceedings initiated by the CLC on October 25, 1973, and thus, the February 21, 1974 decision to remove the exemption was made without publication of notice and opportunity for public comment as required by 5 U.S.C. 553.

This issue was resolved adversely to petitioners' contentions by the court of appeals. There is no occasion for further review of this narrow issue which arises from the peculiar facts of this case.

In any event the court of appeals correctly held that there was no termination of the rule-making proceedings initiated by CLC. As the court of appeals found (Louisiana Pet. App. D, p. 44a):

> In the republication of January 14, 1974, upon which appellees principally rely, there was no discussion of FEO's consideration of the exemption in question, nor was there incorporated a general statement of the purpose for the exemption on the theory that republication was intended as a determination of the rule-making proceeding.

The court of appeals recognized that the "unique circumstances" which required FEO to promulgate a "massively complex petroleum allocation scheme" had resulted in deferral of action on the exemption (*id.* at 45a), and the court concluded that FEO "was entitled to reasonable leeway in the gale of congressional deadline while it assumed charge of the regulatory structure before being required to complete the repair initiated by CLC" (*ibid.*).

The court of appeals noted that evidence of bad faith, unfairness, or unconscionable delay might justify a contrary result but that no such evidence had been offered in this case (Louisiana Pet. App. D, p. 45a). Petitioners' contention that they were entitled to assume that the rule-making proceeding had been abandoned is unsupported by the record; indeed, as the court of appeals found, the "claim of good faith reliance takes on a somewhat hollow, if not artful, sound in view of information elicited during oral argument that at no time prior to actual withdrawal of the exemption did any of [the petitioners] so much as inquire of the agency whether the rule-making proceeding looking toward the withdrawal of

the exemption had, indeed, been abandoned" (*id.* at 48a).[2]

2. Petitioners also maintain that, assuming the validity of the removal of the exemption, it cannot be applied retroactively (Louisiana Pet. 10-17; California Pet. 25-29). As the court of appeals noted, retroactivity claims typically involve absence of notice and here the CLC rule-making proceedings included notice that the removal of the exemption would, if adopted, apply to sales occurring after October 25, 1973. Since the removal of the exemption applies only to transactions occurring after the notice date, its application cannot be characterized as retroactive.

Even if, however, application of the removal to transactions occurring after the notice date is deemed retroactive, such an application is valid. In *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, this Court adopted the following general test with respect to the retroactive application of agency action (332 U.S. at 203):

> [R]etroactivity must be balanced against the mischief of producing a result which is contrary

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[2] Petitioners' suggestion that changed circumstances since the close of the period for comments in the rule-making proceeding vitiated the subsequent withdrawal of the exemption is also without merit. Petitioners were afforded an opportunity to submit comments on March 13, 1974, in the reconsideration hearing, and it is apparent that changed circumstances—such as the three-fold increase in the uncontrolled price of oil and the enactment of the Emergency Petroleum Allocation Act of 1973—confirmed the need for removal of the exemption. See 39 Fed. Reg. 12252.

> to a statutory design or to legal or equitable principles. If that mischief is greater than the ill effect of retroactive application of a new standard, it is not the type of retroactivity which is condemned by law. See *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 620.[3]

The FEO found that the exemption created a disruptive impact on the national petroleum distribution system, injured the competitive position of small and independent refiners, and disrupted historic supply patterns—results which were contrary to the goals of the Emergency Petroleum Allocation Act. 39 Fed. Reg. 12252, *et seq.*

Petitioners do not challenge these findings; rather they assert simply that retroactive application would be unfair because it would deprive states of income which they would otherwise receive. Although petitioners will necessarily receive less than the uncontrolled price, they are treated no differently in this

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[3] *Chenery* involved the retroactive application of an order entered in adjudicatory proceedings. The test adopted by this Court is, however, equally applicable to regulation, as shown in *Addison* v. *Holly Hill Co.*, 322 U.S. 607, cited by this Court in *Chenery*.

Petitioner California's reliance on *National Labor Relations Board* v. *Majestic Weaving Co.*, 355 F.2d 854 (C.A. 2) is misplaced. *Majestic* merely recognizes the general rule that ordinarily rule-making rather than *ad hoc* adjudication should be utilized by agencies to establish new standards. Here the Federal Energy Office utilized its rule-making powers and while regulations are ordinarily given only prospective effect, as shown in the text, retroactive application is appropriate in circumstances such as those present in this case.

regard from other domestic producers of petroleum and petroleum products.

Moreover, the court of appeals' opinion indicates (Louisiana Pet. App. D, pp. 48a, 50a) and, we have been informed by the Federal Energy Administration, that since October 25, 1973, the states have billed customers at the uncontrolled price but, except for isolated instances, have collected only the controlled price.[4] Thus, the hardship which would arise upon the refund of previous collections of substantial sums is not present in this case.

If collection of the uncontrolled price billings were permitted, the goals of the Emergency Petroleum Allocation Act would be nullified; accordingly, the court of appeals properly upheld the application of FEO's removal of the exemption to transactions occurring after October 25, 1973.[5]

3. Finally, petitioners argue that the withdrawal of the exemption cannot be applied to transactions which occurred prior to the date of adoption of the regulation because the Federal Energy Office failed to

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[4] Petitioner Louisiana asserts that "certain" amounts were collected at the uncontrolled price (Louisiana Pet. 17). The affidavit to this effect relied upon by Louisiana does not indicate the precise amount of such collections (see R. 139-142), and the record shows that a demand for payment at the uncontrolled price was not sent to Louisiana's customer until January 30, 1974 (R. 143). Thus, at best such payments, if any, were made only during the period January 30, 1974 to February 21, 1974.

[5] We have been informed by the Federal Energy Administration that accrued but uncollected billings at the uncontrolled price now exceed $250 million.

comply with the 30-day requirement of 5 U.S.C. 553 (d). Section 553(d) requires publication or service of a substantive rule "not less than 30 days before its effective date, except * * * as otherwise provided by the agency for good cause found and published with the rule." The FEO rule contained no express finding of good cause; however, as the court of appeals found (Louisiana Pet. App. D, p. 50a):

> [F]rom the reasons and purposes * * * assigned for the withdrawal of the exemption itself, and the very nature of the entire proceeding in context with the Economic Stabilization Act and the Emergency Petroleum Allocation Act, the cogent reasons for the withdrawal of the exemption as of the date of the initial notice were quite obvious. Under such circumstances any flaw was at most purely technical, being neither prejudicial nor invalidating.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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